

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

April 11, 2019

VIA ELECTRONIC MAIL ONLY

Santa Fe Regional Emergency Communications Center
Mark A. Basham, Esq.
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Santa Fe, New Mexico 87505
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Re: Inspection of Public Records Act Complaints – Andrew Oxford

Dear Mr. Basham:

This letter addresses the complaint filed with the Office of the Attorney General by Mr. Andrew Oxford and the Santa Fe New Mexican alleging that the Santa Fe Regional Emergency Communications Center (hereinafter “the RECC”) violated the Inspection of Public Records Act (“IPRA”), NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2018). Specifically, Mr. Oxford alleges that the RECC proposed to charge him an unlawful fee for copies of certain electronic records. We have also reviewed your response on behalf of the RECC to our inquiry regarding this matter. Having reviewed the facts in this case, we conclude that the RECC violated IPRA by proposing an unlawful copying fee. We also direct the RECC to reevaluate its IPRA fee policy and charge Mr. Oxford only its actual costs of transmitting or downloading the electronic records.

Mr. Oxford submitted an IPRA request to the RECC on October 4, 2018, for “recordings of all calls from 3001 St. Francis Drive, Santa Fe on March 27, 2018.” The RECC responded to his request the next day, on October 5, 2018, and requested that Mr. Oxford complete a “Request for Public Records” form. That form stated, in relevant part, that the RECC “charges \$30.00 for the release of any and all requested audio recordings.” Mr. Oxford refused to fill out this form, strenuously objecting to the proposed \$30.00 fee as not reflective of the RECC’s actual costs of copying the requested electronic files. The RECC replied that, “per our policy,” the proposed \$30.00 fee would stand, also offering Mr.

Oxford the opportunity to listen to the recordings in person. Mr. Oxford then filed the present complaint with our office challenging the proposed fee. The RECC's response to our inquiry regarding this matter offered no further explanation for their flat \$30.00 fee, instead simply referring back to the documentation already provided to us by Mr. Oxford.

In New Mexico, people are entitled to access "the greatest possible information" about governmental affairs. Section 14-2-5. *See also San Juan Agr. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, ¶ 16, 150 N.M. 64, 257 P.3d 884, 888 (observing that "IPRA is intended to ensure that the public servants of New Mexico remain accountable to the people they serve"). The Inspection of Public Records Act provides the public with the right to inspect and copy all "public records" with only limited and specifically enumerated exceptions. Section 14-2-1(A). In line with IPRA's purpose, all exceptions to disclosure are construed narrowly and courts employ a strong "presumption in favor of the right to inspect" when interpreting its statutory language. Attorney General's Inspection of Public Records Act Compliance Guide, p. 7 (8th ed. 2015) ("IPRA Guide").

IPRA governs the fees that a public body may charge a requestor in connection with a public records request, and fees for copies of public records are only permissible if they comply with IPRA's specific requirements. The general rule is that copying fees must be reasonable. Section 14-2-9(C)(1). Public bodies are also allowed to charge their "actual costs" of transmitting the requested records to the requestor, whether that be via physical mail, email, or facsimile. Section 14-2-9(C)(4). As a universal rule, though, IPRA provides that public bodies may never charge for the time employees spend determining whether individual records are subject to disclosure. See § 14-2-9(C)(6) (providing that public bodies "shall not charge a fee for the cost of determining whether any public record is subject to disclosure"); see also IPRA Guide, p. 36 (observing that IPRA "does not allow a custodian to charge for the cost of determining whether a particular public record is or is not subject to disclosure").

Under IPRA, fees for printed records are allowed to be more robust than those for electronic records. For printed records, copying fees must be "reasonable" in an amount up to \$1.00 per page. See § 14-2-9(C) (providing that public bodies "shall not charge fees in excess of one dollar (\$1.00) per printed page for documents eleven inches by seventeen inches in size or smaller"). However, for electronic records, public bodies are limited to only recouping their "actual costs associated with downloading copies of public records to a computer disk or storage device, including the actual cost of the computer disk or storage device" as well as the actual costs of transmitting the electronic records (through email or facsimile). Section 14-2-9(C). In other words, public bodies are only allowed to charge their actual costs for downloading or transmitting their electronic records.

In this case, the RECC charged a fee of \$30.00 for the production of electronic audio files. Their justification for this fee, outlined in their official fee policy, is troubling:

The fee for audio recordings is based on recovery of costs associated with RECC quality assurance staff researching and transferring the requested information onto media for distribution to the requestor. That number is figured by factoring the hourly wage of the QA specialist into the average number of audio tapes created per week. At 1 hour 15 minutes to research and create each record, and an average of 25 records a week at his wage, plus the cost of the media, the resulting cost to the center is \$31.22. The fee charged by the RECC is \$30.00.

The RECC iterated in its response to our inquiry that it “actually loses money for a CD request.” It also claimed, both in response to Mr. Oxford’s request and in response to our inquiry, that “all taxpayers (including media personnel) should be treated equally,” seemingly suggesting that to charge Mr. Oxford less than their flat fee would constitute special treatment for the media.

The RECC’s fee policy plainly violates IPRA, and their insistence on charging Mr. Oxford \$30.00 in accordance with that fee also constitutes a violation of IPRA. Audio recordings, as electronic records, must be provided to requestors at the “actual cost” of the public body, meaning its actual costs of downloading or transmitting those records. Section 14-2-9(C). A flat \$30.00 fee, charged to all requestors and not varied dependent on the circumstances, is almost by definition a violation of Section 14-2-9(C). For one, this cost cannot factor in “an average of 25 records a week,” as the RECC’s fee policy does, because it is limited to the *actual costs associated with the individual request*. Section 14-2-9(C). That is not an ambiguous provision in IPRA.

Moreover, the RECC’s inclusion of employee time spent doing “research” into IPRA requests is not authorized by IPRA, which specifically prohibits public bodies from charging for time spent “determining whether any public record is subject to disclosure.” Section 14-2-9(C)(6). Employee time spent locating and evaluating responsive records cannot be charged to a requestor without violating this provision. Again, IPRA allows only for the actual costs associated with “downloading copies of public records to a computer disk or storage device” and transmitting the requested records to the requestor. Section 14-2-9(C).

To be clear, the RECC can charge fees for copies of audio files. But those fees must conform to Section 14-2-9(C)’s requirements. Therefore, we direct the RECC to modify its IPRA fee policy to conform to its statutory duties. We also direct the RECC to revisit its proposed fee to Mr. Oxford and propose a fee no larger than its actual costs of downloading and transmitting the requested records.

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For your reference, a copy of the IPRA Guide is available on the website of the Office of the Attorney General at www.nmag.gov. If you have any questions regarding this determination or IPRA in general, please let me know.

Sincerely,

A handwritten signature in blue ink, appearing to read "John Kreienkamp", is positioned above the printed name.

John Kreienkamp
Assistant Attorney General

Cc: Andrew Oxford